

Exhibit “1”

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DEPT. 5
IN OPEN COURT

MAY 11 2001

Pierce County Clerk
By *[Signature]*
DEPUTYThe Honorable Vicki L. Hogan
Hearing Date: May 11, 2001IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCEROXETTE BUSANI, individually and as
the representative of all persons similarly
situated,

NO. 99-2-08217-1

Plaintiff,

CLASS CERTIFICATION ORDER

vs.

UNITED SERVICES AUTOMOBILE
ASSOCIATION,

Defendants.

6 MAY 14 2001

This matter is before the Court on Plaintiff Roxette Busani's motion for certification of a Plaintiff class under Washington Superior Court Civil Rules Rule 23 (Civil Rule 23). Plaintiff has moved for certification of the following class:

SMY *class* *Ⓢ*
All persons in the United States who: (1) were insured under an automobile insurance policy issued by USAA; (2) received payment under the uninsured or underinsured (Part C) coverages for property damage to an insured automobile from May 30, 1993 to January 30, 2001; and (3) did not receive payment for inherent diminished value where: (a) the repair estimate including supplements totaled at least \$1,000, (b) the vehicle was no more than six years old (model year plus five years) and had less than 90,000 miles on it at the time of the accident, and (c) the vehicle suffered structural (frame) damage and/or deformed sheet metal and/or required body or paint work.

SMY *Ⓢ*
"CLASS STATES" include the following 26 states and the District of Columbia: ALASKA, ARKANSAS, CALIFORNIA, COLORADO, DELAWARE, GEORGIA, ILLINOIS, INDIANA, LOUISIANA, MARYLAND, MISSISSIPPI, NORTH CAROLINA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, OHIO, OREGON, RHODE ISLAND, SOUTH CAROLINA, TENNESSEE, TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON, and WEST VIRGINIA.

CLASS CERTIFICATION ORDER- 1

ORIGINAL

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1 Excluded from the proposed class are policyholders whose vehicles were leased, total
2 losses, employees of USAA, its officers and/or directors, Plaintiff's counsel and the Judge of the
3 Court to which this case is assigned.

4 The Court has considered the substantial briefing, argument, and evidence submitted by
5 the parties. For the reasons set forth herein, and in the Court's decision from the bench,
6 Plaintiff's motion is granted.

7 I. STATEMENT OF THE CASE.

8 Plaintiff Roxette Busani ("Busani") alleges that her insurer, United Services Automobile
9 Association ("USAA"), breached the provisions of its automobile insurance contract by failing to
10 pay her for the inherent diminished value sustained when her car was damaged in a collision with
11 an uninsured motorist; failing to assess her car for inherent diminished value when presented for
12 repair, and failing to inform her regarding inherent diminished value. According to Ms. Busani,
13 "inherent diminished value" is the loss in value a vehicle suffers because it has been wrecked;
14 this loss in value results from the inability to fully restore a vehicle to its pre-loss condition, and
15 the resulting unwillingness of buyers to pay as much for a vehicle which lacks the assurance of
16 reliability and performance of a vehicle which has not been wrecked. According to Ms. Busani,
17 this reduction in value occurs regardless of whether a vehicle is properly repaired or is in fact
18 repaired at all.

19 The Plaintiff class includes individuals who, like Ms. Busani, received compensation
20 under Part C (regarding uninsured and underinsured motorist coverages, hereinafter referred to as
21 "UIM") of USAA's insurance policies, whose operative language is substantially the same, after
22 their automobiles suffered compensable property damage, but did not receive payment for loss
23 due to inherent diminished value.¹ Plaintiff alleges that inherent diminished value is well-
24 recognized in the automobile industry, that it can be quantified through the use of a classwide

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26 ^{1/}The proposed class does not include those who received payments under the other first party coverages
found in Part D which provide indemnification for collision and comprehensive losses.

1 damages study based upon market or survey data, that payment for it is owed under Part C, and,
 2 finally, that USAA had a duty to inform its insureds of its existence when they presented their
 3 vehicles for determination of loss and repair under the policy.

4 The record reveals that USAA provided and extended UIM coverage and paid first party
 5 property damage claims under the Part C coverages at issue in this lawsuit in twenty-seven states
 6 from 1993 through 1999. The record also reveals that there have been as few as a single claim
 7 paid under Part C over this seven years time span in two states, North and South Dakota (in 1995
 8 and 1998 representatively), while there were 13,709 claims paid under Part C in Texas over this
 9 same seven year period. Plaintiff contends that few, if any, of these individuals received payment
 10 for inherent diminished value to their vehicles despite this being a recoverable item of damages
 11 in every state.

12 Although USAA has, according to Plaintiff, paid few, if any, diminished value claims, its
 13 nationwide handling of diminished value claims has been reduced to writing in a manual. This
 14 manual, the computerized online procedure system or "COPS," was provided under a
 15 confidentiality agreement and protective order.² The manual expressly recognizes the possibility
 16 of claims for diminished value, and defines "diminution in value" as "the difference in the
 17 vehicle's market value pre-loss and post-loss after proper repairs have been done." *Ibarra Depo.*
 18 *Exh. 1 at UWA03021.* USAA's policy, according to the claims manual, is to "advise the
 19 member of the possibility of diminution in value in states requiring payment of diminution in
 20 value on first party losses." *Id. at 03020.* UIM Part C coverage is by definition first party
 21 coverage. USAA's claims manual further recognizes, according to Plaintiff, that payment of
 22 inherent diminished value "is appropriate in all states as an element of damage for which the
 23 insured may become legally liable, provided the claimant proves or substantiates the damage" in
 24 third-party tort claims. *Ibarra Depo. Exh. 5 at 5.* According to Plaintiffs, Defendant concedes

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 26 ²USAA's "claims manual" is an electronic document, copies of which were provided to the Court as
 Exhibits 1 and 3-5 to the September 20, 2000 deposition of Ms. Mary Ibarra.

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that this language applies to the UIM Part C claims at issue in this suit. *Ibarra Depo.* at 111-12. Plaintiff finally notes that USAA's corporate designee, Mary Ibarra, testified that there has been no change in philosophy or guidelines by USAA in the last 7 years regarding payment of first party losses for diminution in value under Part C. *Ibarra Depo.* at 44. This is the kind of class-wide evidence on which Plaintiffs intend to rely to establish a common course of conduct by USAA during the class period.

USAA contends that inherent diminished value is a novel theory of law in Washington, and that when an insured makes a claim under Part C of the policy on behalf of a tortfeasor who is uninsured, they stand in an adversarial relationship to their insured. USAA claims, therefore, that it has no duty to inform claimants under Part C of the possibility of coverage for inherent diminished value. ~~As a result, as demonstrated at the class certification hearing, USAA's current~~ ^{procedure} practice amounts to, "Don't ask, Don't tell." Under this ~~policy~~, USAA provides no information on inherent diminished value to its policyholder^s making UIM claims. ^{volunteers}

II. LEGAL STANDARD ON CLASS CERTIFICATION

The class certification determination must be made in strict conformity with Civil Rule 23. In applying Civil Rule 23, the Court has not adjudicated and makes no ruling on the merits, but decides now only whether the statutory prerequisites of class certification have been satisfied. The Court has considered each element of Civil Rule 23, because a class can be certified only if each of the four requirements under Civil Rule 23(a) has been satisfied and the requirements of one of the parts of Civil Rule 23(b) are met.

III. REQUIREMENTS OF COURT RULE 23(a)

A. Numerosity.

The number of class members must be so numerous that the joinder of all members is impractical. Under Washington law there is no rigid mathematical formula for determining numerosity. A sufficient class has been held to be as many as one million, and as few as twenty-

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1 five to forty individuals. A class satisfies the numerosity requirement if it is sufficiently large
2 such that separate suits by each member would be difficult or inconvenient, and that it would be
3 impractical to join all the potential members.

4 Based upon USAA's answers to interrogatories, the proposed class is estimated to include
5 roughly 24,754 UIM claims. These class members are geographically dispersed in up to twenty-
6 seven states. Under these circumstances, the numerosity prerequisite is satisfied. In addition, the
7 individual amount of each member's claim is sufficiently small to dissuade many class members
8 from pursuing separate actions. Given the number of claims, the trial of multiple separate claims
9 by each of the potential class members would be an imposition on the litigants and the courts and
10 would raise the possibility of inconsistent verdicts.

11 USAA can identify most of the information for identification of the class members from
12 its computer records, although identification of certain of the exclusions would, according to
13 USAA, require a hand search of the relevant claims files. A significant amount of information is
14 in USAA's computer database, and slightly overinclusive notice to an objectively-defined and
15 identifiable class can be provided. For all these reasons, the Court finds that numerosity is
16 satisfied.

17 **B. Commonality.**

18 For certification to be appropriate, questions of law or fact which are common to the class
19 must exist. Moreover, under Civil Rule 23(b)(3), these common questions of law or fact must
20 predominate over any questions affecting only the individual members. The two requirements
21 overlap to some extent.

22 The proposed class includes only first party claimants under Part C of the policy who
23 filed a property damage claim where USAA provided and extended coverage for property
24 damage losses. None of these class members received inherent diminished value as part of their
25 recovery under Part C of their policy. None of these class members were informed of USAA's
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1 policy on diminished value. These events all occurred under, and were the result of, USAA
 2 policies and procedures found in its nationwide claims manual. The nature and proprietary of
 3 USAA's claims handling practices, the existence of inherent diminished value, and damages
 4 resulting from it, all present classwide issues of fact and law for adjudication.

5 Nor are there, as USAA claims, individual issues regarding "repair related diminished
 6 value" which swamp these predominating common issues. The documents presented to this
 7 Court demonstrate the existence of three types of diminished value payments that the Court could
 8 consider: the alleged difference in the pre-accident and post-accident value of the car (which
 9 Plaintiffs refer to as "inherent diminished value" and Defendant's claims manual refers to as
 10 "diminution in ^{diminution in} value"); the additional diminished value which USAA suggests occurs when the
 11 repairs on the vehicle are not properly made; and finally, ^{diminution in} diminished value which may result
 12 from the inability to complete a vehicle's repair due to insufficient money being paid to repair the
 13 vehicle. It is clear to the Court that Plaintiffs are not making a repair-related claim for
 14 diminished value; nor are they making a claim that there was not enough money provided to
 15 complete the repairs. Rather, Ms. Busani is making a claim exclusively for the alleged difference
 16 in the pre-accident and post-accident value of her car, which she claims exists whether or not the
 17 vehicle is ever repaired. The existence and amount of this type of "inherent diminished value"
 18 presents classwide fact issues, as does the propriety of USAA's handling of this type of claim.
 19 These core factual issues predominate.

20 Even though Washington law requires only the existence of common questions of law or
 21 fact, there are also common and predominating issues of law. The relevant language in each
 22 policy is functionally identical, and the legal duties owed under it present common legal issues.
 23 Each class member has a common interest in a determination of whether USAA is obligated to
 24 compensate its insureds and policy holders for inherent diminished value. This includes the
 25 common legal issues of whether USAA breached its contract by failing to pay its insureds
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CLASS CERTIFICATION ORDER- 6

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1 inherent diminished value, whether USAA owed a duty of good faith to inform its insureds of
2 inherent diminished value, and whether USAA's failure to inform its insureds of inherent
3 diminished value in the circumstances of this case constituted a breach of the duty of good faith
4 and fair dealing and breach of contract. The existence of, and proof of, the obligation to assess
5 the vehicle for, tell about, and/or pay for inherent diminished value present classwide legal
6 issues.

7 **C. Typicality.**

8 The third requirement of Civil Rule 23(a) is that the claim of the representative party be
9 typical of the claims of the class members. This overlaps with the second requirement of
10 commonality. As the Court has already found, there is commonality between Ms. Busani's claim
11 and that of the members of the class. Ms. Busani's claim is typical of those of the members of
12 the proposed class so that she can fairly represent members of the class.

13 **D. Adequacy.**

14 The fourth requirement of Civil Rule 23(a) is that the representative party will fairly and
15 adequately protect the interests of the class. This Court has considered the adequacy not only of
16 the Plaintiff, but also the adequacy of Plaintiff's counsel — which was not disputed by USAA.
17 The record suggests that the Plaintiff will adequately and fairly protect the interests of the class.

18 The main argument advanced by USAA as to Ms. Busani's adequacy is that she, as an
19 insured, is also an owner of the company. The Court finds in the context of this case that this
20 does not defeat Ms. Busani's showing of adequacy. This is not the type of conflict suggested by
21 the cases in analyzing whether there is a conflict with the other class members. The Plaintiff has
22 no management influence, or decision making authority at USAA as a result of her ownership,
23 which is simply due to the payment of her premiums. Rather, the payment of her premium
24 entitles her to be eligible for receipt of member benefits. True conflicts only exist where the
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1 objectives and the legal and factual positions of the class members are opposed. There are no
2 such conflicts between Ms. Busani and the other class members.

3 The record also shows that Plaintiffs' counsel are adequate. The Court has considered the
4 quality and experience of the attorneys for the class, including the size, scope and complexity of
5 prior litigation they have undertaken. The Court is very familiar with the work of Mr. Hansen,
6 who has appeared numerous times before the Court, and has had an opportunity to observe the
7 other class counsel during these proceedings and to evaluate their work product. It appears that
8 Plaintiff's counsel have vigorously pursued the case since the filing of the lawsuit and have
9 timely sought class certification. The Court has no reason to doubt that they have sufficient
10 financial resources to absorb the expenses involved in being the named counsel for the class.
11 The Court therefore finds that the adequacy requirement has been satisfied. Because typicality,
12 commonality, and numerosity have also been satisfied, the requirements of Civil Rule 23(a) have
13 been met.

14 IV. REQUIREMENTS OF CIVIL RULE 23(b)

15 Civil Rule 23(b)(3) is satisfied if common questions of law or fact predominate over
16 questions affecting only the individual members, and if a class action is superior to other
17 available methods for a fair and efficient adjudication of the controversy. The Court has
18 carefully considered the evidence in the context of the statutory factors contained in Civil
19 Rule 23(b)(3) in reaching its decision. The Court has considered, *inter alia*, the interests of the
20 members of the class to control the case, the extent and nature of other litigation already
21 commenced by members of the class, the desirability or undesirability of concentrating litigation
22 of claims in this forum, and, most importantly, the possible difficulties in management of this
23 class action.

24 There is nothing easy about considering whether to certify a class action from the point of
25 view of the litigants, as well as the time involved for the Court. The key questions before this
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1 Court are whether or not a class action is an appropriate and superior method for a fair and
 2 efficient adjudication of this controversy. The Court has already addressed predominance in its
 3 discussions of commonality of legal and factual issues, which this Court has found to
 4 predominate over any claimed individual issues. Remaining for the Court is the issue of whether
 5 or not a class action would promote the uniformity of decisions to accomplish the ends of equity
 6 and justice. These are issues of both predominance and manageability which were raised
 7 repeatedly by USAA in the contexts of choice of law and proof of classwide damages.

8 The choice of law argument has been extensively briefed and argued by the parties and
 9 carefully considered by this Court. Although foreign law was not specifically pled, it was argued
 10 by USAA throughout its submissions. The Court finds that the insurance contracts at issue,
 11 whose operative language is substantively the same, contain no choice of law provision calling
 12 for application of another state's law so that traditional Washington choice of law principles can
 13 be applied. Washington has rejected the *lex loci* rule in favor of the most significant relationship
 14 approach, therefore, under Washington choice of law rules, this Court first looks to see if
 15 conflicts requiring a choice of law decision have been shown. After considering the conflicts
 16 raised in all of the materials presented by USAA on contributory negligence, statute of
 17 limitations and the breach of contract claim, the Court finds that there are no outcome
 18 determinative variations of law which preclude application of Washington contract law to the
 19 members of the proposed class.³

20
 21 ³/Washington law requires the proponent of foreign law to demonstrate that another state's law is
 22 "fundamentally incompatible with Washington's" law. *Burnside v. Simpson Co.*, 123 Wn. 2d 93, 101, 864 P.2d 937,
 23 941 (1994). This is a "technically pragmatic approach" which places the burden on the proponent of foreign law.
 24 *Byrne v. Cooper*, 11 Wn. App. 549, 523 P.2d 1216 (1974). USAA argues, however, that this burden should be
 25 flipped and placed on Plaintiffs at the initiation of this case because this is a class action. Such a rule would require
 26 Plaintiff to somehow prove the absence of any outcome determinative conflicts, and then require the Court to consider
 27 and decide choice of law issues without any context for the issues raised, which may or may not arise during the
 28 course of trial. The out of state authorities cited by USAA in support of this argument are distinguishable because,
 unlike in the cited cases, there is no choice of law clause in the contracts at issue and none of the substantive claims at
 issue in this lawsuit requires this Court to apply a *lex loci* rule and therefore automatically apply multiple states' laws.
 Although the reasoning of the California Supreme Court in *Washington Mutual Bank, F.A. v. Superior Court*
 (*Briseno*), 24 Cal. 4th 906, 15 P.3d 1071, 103 Cal. Rptr. 2d 320 (2001) (unanimously rejecting argument that where
 there was no effective choice-of-law agreement (or by extension a *lex loci* rule) that the normal burdens of

USAA also claims that damages cannot be shown and distributed in a class wide manner and therefore this case is "unmanageable." Under Washington law, certification is appropriate if damages can be calculated for the class and then distributed in a post-trial claims process. *Pickett v. Holland American Line-Westours, Inc.*, 101 Wn. App. 901, 920-21, 6 P.3d 63, 72-3 (2000). Variations in the amount of damages between class members does not defeat class action treatment. *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976).

Plaintiff has discussed in depth two methodologies that could be used to gather data on the amount of loss due to diminished value sustained by members of the proposed class. According to Plaintiff, a matrix created from this data can then be used to distribute those damages to class member in a claims process.⁴ The first methodology would involve the collection of auction data on damaged vehicles which have been properly repaired and undamaged vehicles. The second methodology would involve a survey of experts in the field, *i.e.* buyers and sellers of vehicles, to determine the loss in value due to inherent diminished value. According to Plaintiff, the data from either approach would then be utilized in a multiple regression analysis to establish the amounts of damage suffered by members of the class due to inherent diminished value.

Although the Court does not decide, and should not decide, the merits of these claims, both appear to the Court to be feasible methods of calculating inherent diminished value. In reaching this conclusion the Court notes that both proposed methods closely mirror the methods

demonstrating material variations in a choice of law analysis should be shifted to Plaintiffs in class actions) is persuasive, this Court need not reach this issue. Both parties have briefed the claimed variations in law, and, having reviewed these materials, the Court finds that no outcome determinative conflicts exist. Because this briefing has been done, the issues of burdens need not be reached as it would not affect the Court's decision in this matter.

⁴Plaintiff presented expert testimony to support her contentions. Because the Court does not adjudicate here the merits of Plaintiffs' claims, nor rule on the validity of Plaintiff's proposed damage model, the Court granted USAA's motion to exclude the testimony. Therefore the Court has not considered their testimony and has instead considered the proposed methods as presented in the pleadings and the arguments of counsel in the context of Washington law.

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1 approved by USAA's claims manual to calculate diminished value when USAA pays diminished
 2 value claims.⁵ Because Plaintiff has proposed what appear to be feasible methods of calculating
 3 and distributing damages they should be allowed to develop the actual damage model through
 4 discovery after which time this Court can then rule on its admissibility.

5 Having found this litigation to be manageable as a class action as to choice of law and
 6 damages, this Court finds that a class action is the only practical and efficient means for
 7 policyholders to present their relatively small claims, and for USAA to achieve some finality in
 8 this matter. Without class certification, the individual class members may not seek redress
 9 because their individual losses may be too small to motivate them to prosecute their claims
 10 and/or their claims may clog court dockets with multiple and scattered suits. Either outcome is
 11 unjust and inefficient compared to class treatment. Class treatment will provide economy of time
 12 for the litigants, the courts, and the attorneys.

13 Not only is class treatment superior, but USAA's course of conduct, the issues of good
 14 faith and breach of contract, and whether USAA has a duty to notify class members of their
 15 rights, all present common issues as to the members of the class. These issues predominate and
 16 make class treatment superior to the arbitration proceedings USAA suggests be employed instead
 17 of certification. Such arbitration proceedings would be impractical and are not mandated under
 18 the contract.

19 Therefore, it is ORDERED the Plaintiff's motion for class certification is GRANTED and
 20 that the following class is hereby certified for trial:

21 All persons in the United States who: (1) were insured under an
 22 automobile insurance policy issued by USAA; (2) received payment under
 23 the uninsured or underinsured (Part C) coverages for property damage to
 an insured automobile from May 30, 1993 to January 30, 2001; and (3) did
 not receive payment for inherent diminished value where: (a) the repair

24 _____
 25 ⁵USAA's Claims Manual directs its appraisers to compare the market value of like vehicles in the area
 26 (determined by a guide book or local market survey). The value of the damaged and repaired vehicle can be
 27 determined by (1) "securing bids on the vehicle" (similar to the auction value survey proposed by Plaintiffs); (2) by
 obtaining valuations from "franchised dealer owners and/or general managers" (similar to the subject matter expert
 survey proposed by Plaintiffs); and (3) by utilizing professional valuation services. See Ibarra Depo. Exh. 1 at
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estimate including supplements totaled at least \$1,000, (b) the vehicle was no more than six years old (model year plus five years) and had less than 90,000 miles on it at the time of the accident, and (c) the vehicle suffered structural (frame) damage and/or deformed sheet metal and/or required body or paint work.

Excluded from the class are policyholders whose vehicles were leased, total losses, employees of USAA, its officers and/or directors, Plaintiffs' counsel and the Judge of the Court to which this case is assigned.

It is further ORDERED that Ms. Busani is appointed to serve as the class representative of this class. The following counsel are also hereby appointed to serve as Plaintiffs' Class Counsel: Terrell Oxford of Susman Godfrey, LLP; Elizabeth J. Cabraser, Morris A. Ratner, and Scott P. Nealey of Lieff, Cabraser, Heimann & Bernstein, LLP; Debra Hayes of Reich & Binstock; and Stephen M. Hansen of Lowenberg, Lopez & Hansen, P.S.

DONE IN OPEN COURT this 11th day of May, 2001.

Vicki L. Hogan
VICKI L. HOGAN, Superior Court Judge

Presented by:

LOWENBERG, LOPEZ & HANSEN, P.S.

Stephen M. Hansen
STEPHEN M. HANSEN, WSBA#: 15642
Of Attorneys for Plaintiff

Copy Received, Approved as to Form and Content; Notice of Presentment Waived

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CLASS CERTIFICATION ORDER- 12

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